No. 82-1998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. CLARK,
SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE,
ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether respondents' act of sleeping outdoors in a public place in the dead of winter to convey the plight of homeless people is sufficiently expressive to warrant First Amendment protection; and if so, (2) whether petitioners have failed to demonstrate a sufficiently substantial interest to justify suppressing it.

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE[1/]

Respondents assert no constitutional right to camp in Lafayette Park or on the Mall. They do not seek to use the park or the Mall for "sleeping accommodations," "living accommodations," or "camping" purposes. In this respect, the petitioners have seriously mischaracterized respondents' request. See Petitioners' Br. at 2, 3, 11, 12.

What respondents do seek is to re-enact the central reality of homelessness, in a highly public place in the dead of winter, in order to express the message that the plight of homeless people is serious and too often ignored. As one of the homeless men seeking to demonstrate explained:

1/ In accordance with Rule 34.2 of the rules of this Court, this statement of the case contains only the material deemed necessary to correct inaccuracies and omissions in petitioners' statement.

> Sleeping in Lafayette Park or on the Mall, for me, is to show people that conditions are so poor for the homeless and poor in this city that we would actually sleep outside in the winter to get the point across. It's a serious problem, having nowhere to sleep, no money....

Declaration of James Wilson, ¶ 8, RD 5;[2] see also Second Declaration of Clarence West, ¶ 1, RD 5 (who seeks to sleep to demonstrate that he and others "have no home, no place to go").

The homeless persons in this case, and others like them, are destitute and on the street for a variety of reasons. Some are young; some are old. Many are part of families; some have recently lost their families.[3] Some were recently

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2/ References to documents in the district court record are identified by record document ("RD") number. See Jt.App. at 1-3.

3/ See, e.g., Declaration of Clarence West, ¶ 4, RD 2.

working, but lost their jobs and ran out of money;[4] some have not been able to get a regular job in a long time.[5] Many are on the streets because of serious mental problems; many more have developed mental problems or physical ailments while struggling to survive on the streets. Each day, and each night, these people confront the same question: How, without money or resources, will I get the food, the clothing, and the shelter I must have to survive?[6]

These homeless people, and members of the Community for Creative

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4/ Id., ¶¶ 4-7; see also Declaration of Monroe Kylandezes, ¶ 5, RD 2.

5/ See, e.g., Declaration of James Wilson, ¶¶ 1, 10, RD 5.

6/ See Declarations of Monroe Kylandezes, Fred Randall, and Clarence West, RD 2; and Declaration of James Wilson, RD 5.

Non-Violence[7] seek to demonstrate to draw public attention to the life-threatening problems the homeless face. They seek to sleep as part of their demonstration wholly for expressive purposes. They do not plan to break ground, build fires, cook or prepare food, store belongings or engage in any other activity associated with setting up camping or living accommodations, either temporary or permanent. Jt.App. at 9-15.

The homeless persons here do not need to sleep in Lafayette Park or on the Mall in order to have a temporary place to sleep. Although they lack decent shelter they can and often do scrounge sleeping space in abandoned buildings, in downtown parking garages, in deserted

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7/ The Community for Creative Non-Violence (hereinafter "CCNV") is a religious association that supplies food, clothing, shelter, and other assistance to poor and homeless persons.

doorways, on heat or steam grates, or sometimes in an emergency shelter.[8/] Their purpose in sleeping at the demonstration is, in James Wilson's words, "to get the point across." Declaration of James Wilson, ¶ 8, RD 5. As Clarence West explains:

> We are out in the street dealing with it all twenty-four hours a day. There is no rest from it. That is what we are trying to show in Lafayette Park.

Declaration of Clarence West, ¶ 10, RD 2.

During the winter of 1981-82, CCNV organized a similar demonstration in which homeless people spent the night -- awake and asleep -- to dramatize the seriousness of their plight and to convey to the government and the public the fact that they were without homes or

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8/ See, e.g., Declaration of Monroe Kylandezes, ¶¶ 7-9, RD 2.

shelter.9/ The demonstration, in one quadrant of Lafayette Park, was peaceful and orderly, and resulted in no damage to park property and no interference with the ability of others to use Lafayette

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9/ The 1981-82 demonstration was permitted pursuant to court order. See Community for Creative Non-Violence v. Watt, 670 F.2d 1213 (D.C. Cir. 1982). The Court of Appeals determined:

> [A]s the District Court found, in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to go.... Indeed, the uncontroverted evidence in this case is that the purpose of the symbolic campsite in Lafayette Park is "primarily" to express the protestors' message and not to serve as a temporary solution to the problems of homeless persons. Thus, the only activity at issue here -- sleeping in already erected symbolic tents -- cannot be considered "camping."

Id. at 1216-17 (footnotes omitted).

Park.10/

In the view of those who participated, the demonstration in the winter of 1981-82 helped to make homeless people and their problems more visible and concrete for members of the public and government officials who saw or heard about the protest.11/ For this reason,

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10/ Declarations of Gabriel Leanza, ¶¶ 4-14, William Perkins, ¶ 11, and William Peters, ¶¶ 3, 7-11, RD 19.

The petitioners err in stating that sleeping during the 1981-82 demonstration by the homeless "spilled over into other camping activities." Petitioners' Br. at 49 n.42. Although petitioners cite to district court factual findings on this point, those findings -- made without an evidentiary hearing -- were sharply disputed. See Objections of Plaintiffs to Defendants' Proposed Findings of Fact and Conclusions of Law at 3-5, RD 22. There is ample evidence in the record to prove that the 1981-82 demonstration did not include "camping activities." See Declarations cited in this footnote; see also Third Declaration of Mitch Snyder (and Exs. A and B thereto), RD 19.

11/ Declarations of Fred Randall, ¶¶ 5-11, and Clarence West, ¶ 9, RD 2; Declaration of James Wilson, ¶ 6, RD 5; and Declarations of Gabriel Leanza, ¶¶ 6-9, 13-14, William Peters ¶¶ 5-6, and William Perkins, ¶ 10, RD 19.

members of CCNV sought permission from the National Park Service to conduct a similar demonstration beginning on the first day of winter in December, 1982. Jt.App. at 9-15. They requested and received permission for a demonstration consisting of twenty tents and fifty people in one quadrant of Lafayette Park, and forty tents and one hundred people in a large, open area of the Mall (not adjacent to any monuments). Id. at 9-17.

Both of these sites are flat areas (landscaped only with grass) that have served as the locations for many previous demonstrations and special events involving substantially larger numbers of persons, ranging from a papal mass[12/] to a recent Washington Redskins football rally.[13/] Neither site is, as the

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12/ See infra note 20.

13/ Wash. Post, Jan. 26, 1984, at A-1, col. 1.

petitioners claim, "fragile" (Petitioners' Br. at 11, 34). Nor will either site be "crowded" (id. at 11, 16) by the number of persons proposed for the respondents' demonstration.

The historical and political significance of Lafayette Park and the Mall played an important role in the plan for the demonstration by homeless persons. As Clarence West explained:

> Lafayette Park has a special significance for people like me who have grown up in D.C. We call it "Freedom Park" because over the years all the protests and demonstrations for civil rights -- for our people's freedom -- have been held in that park. The only time it was different was in 1963 when Martin Luther King was here. There were so many people we had to go over to the Mall. For me, to demonstrate in Lafayette Park or the Mall would be to carry on a long tradition of my people.

Declaration of Clarence West, ¶ 13, RD 2.

Even before Lafayette Park became an important situs of civil rights

demonstrations by Black citizens, it had provided a forum for other citizens petitioning for a redress of grievances. For example, women citizens seeking suffrage demonstrated in front of the White House in 1917.14/ The memorial core park areas have been the scene of memorable events that raised the public's consciousness, including Marian Anderson's 1939 concert on the steps of the Lincoln Memorial after she was refused permission to sing in Constitution Hall, and the 1963 March on Washington in which approximately 250,000 persons came to the capital, to press for greater progress toward racial and economic justice. The 1963 march culminated in Martin Luther King, Jr.'s historic "I Have a Dream" speech at the

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14/ Washington Star, March 4, 1917, at 4, col. 1; Wash. Post, Feb. 4, 1917, at 1, col. 1.

Lincoln Memorial.15/ Again, in 1968 this memorial core area was the site of the "Poor People's Campaign" and "Resurrection City."16/ Both the Mall and the Park were also important sites for mass demonstrations protesting the Vietnam conflict,17/ and a variety of less-publicized demonstrations on issues of domestic and international importance.

The memorial core park areas have also served as the locations for a wide variety of special public events sponsored by the National Park Service or by private entities. Activities hosted,

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15/ Washington Afro-American, Aug. 31, 1963, at 1, col. 1; N.Y. Times, Aug. 29, 1963, at 1, col. 4.

16/ Wash. Post, May 13, 1968, at A-1, col. 2.

17/ See, e.g., Washington Daily News, Feb. 12, 1978, at 5; Washington Star, Oct. 16, 1969, at A-1, col. 4.

or promoted, by the Park Service on the Mall have included annual Fourth of July concerts and fireworks displays attracting several hundred thousand persons,18/ large folklife festivals lasting several weeks each year,19/ and a 1979 papal mass which attracted over one million worshippers and onlookers.20/ The Park Service has also permitted an antique car show, commercial twin rotor helicopters,21/ weekend polo games, large troupes of performing dancers, frisbee-throwing festivals,22/ marathon

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18/ See, e.g., Wash. Post, July 5, 1980, at B-1, col. 1.

19/ See, e.g., Wash. Post, Oct. 4, 1979, at D-11, col. 6.

20/ See "The Pope In Washington," Wash. Post, Oct. 8, 1979, at A-23, col. 1.

21/ See Washington Star, April 2, 1967, at A-1.

22/ See Wash. Post, Sept. 1, 1981, at C-1.

races, and a "brunch" for circus elephants[23/] at various sites in the memorial core park areas.

Special events of this type, held at various locations in the memorial core area, as well as demonstrations, are coordinated by the Park Service through the use of an advance permit system. 50 C.F.R. § 50.19(b). Persons requesting permission to demonstrate, for example, can secure a permit to demonstrate for up to seven days in one quadrant of Lafayette Park. Id. at § 50.19(e)(5). If there are competing requests for use of the space, the permit will not be renewed. Id. Also, all park users (including demonstrators) must obey a detailed set of Park Service regulations

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23/ See Permit Application and Park Service Permit for Ringling Bros. and Barnum & Bailey Circus, Ex. 5 to Plaintiffs' Summary Judgment Reply Memo., RD 13.

designed to ensure that no visitors damage park resources or deprive others of their use.24/ In these ways, the Park Service has been able to both preserve the memorial core parks and encourage their use for a wide variety and high volume of public activities.

Within the memorial core area, Lafayette Park and parts of the Mall (as well as certain other areas, such as the Ellipse and Farragut Square) have developed as "urban parks," well suited to a healthy mix of political expression and recreational use. Visitors to

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24/ See, e.g., 36 C.F.R. §§ 50.7-50.18, 50.24-50.35, 50.39-50.45, 50.50-50.52. These regulations prohibit the following activities in the parks, inter alia: damaging statues, drinking fountains, plumbing, lawns, and any other park facilities; dumping, storing any materials, or spilling; picnicking in undesignated areas; gambling; soliciting or sales without a permit; committing a nuisance or engaging in disorderly conduct; unauthorized bathing; use of audio devices; lying on park benches; use of liquor; and obstructing entrances, exits or sidewalks.

Washington, as well as residents of the city and surrounding areas, expect to find a wide variety of both political and recreational activity in these areas.25/ Other park areas, near the monuments and memorials, have come to be recognized as places for reflection and contemplation;26/ the serenity of such park areas is not at issue in this case.

25/ As one guidebook explains, "The park still attracts lunchtime philosophers -- as well as chessplayers and sun-worshippers -- since Lafayette Square is one of the most popular sites for brown-baggers. You may recognize the park as the locale of past demonstrations shown on the nightly news; its proximity to the White House makes Lafayette Square popular with protestors." J. Duffield, W. Kramer, and C. Sheppard, Washington, D.C.: The Complete Guide at 120 (1982). This location has come to be viewed as the American analogue to "Speaker's Corner" in Hyde Park.

26/ See 36 C.F.R. § 50.19(c)(2), restricting or prohibiting demonstrations and special events at the Washington Monument, the Lincoln and Jefferson Memorials, and parts of the Kennedy Center; see also Community for Creative Non-Violence v. Watt, 703 F.2d at 599 n.35.

In construing its 1982 "no camping" regulations, the Park Service has twice permitted sleeping activity in demonstration contexts: first, in May, 1982, when it permitted expressive sleeping by 750 to 1,000 Vietnam veterans seeking to re-enact, at a site on the Mall, conditions at United States military encampments in Vietnam,27/ and second, in August, 1982, when it renewed the demonstration permit for approximately one dozen Arab women (including the wives of several diplomats) who were sleeping in a tent in Lafayette Park as part of a fast and vigil to protest the Israeli

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27/ See Vietnam Veterans Against the War "Firebase Razor" Permit Application, and accompanying Park Service Letter and Permit, Exs. 1a, 1b, and 1c to Plaintiffs' Summary Judgment Memo., RD 5.

blockade of Beirut.28/

The 1982 Park Service decisions to allow sleeping by these other demonstrators belie the government's assertion that it has an interest in prohibiting any and all sleeping activity in these park areas. The fact is that plain, ordinary sleeping in the park -- without camping amenities -- impairs no significant governmental interest. Indeed, scores of homeless people sleep in the memorial core park areas each night, in solitary spots, huddled against the elements. They sleep in McPherson Square; they sleep on the grassy lawn south of the Old Executive Office Building. They sleep in the park

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28/ See Arab Women's Council Permit Application, and accompanying Permit Check List, Exs. 3a and 3e to Plaintiffs' Summary Judgment Memo, RD 5; see also Declarations of Mary Ellen Hombs, ¶¶ 23-26, Carol Fennelly, ¶¶ 3-6, and Barbara Gamarekian (and exhibit thereto), RD 5.

adjacent to the Department of Interior Building, and on the heat grates on nearby corners. And they sleep on the Mall and in Lafayette Park. There are nights when they occupy "virtually every bench" in Lafayette Park.29/

Unfortunately, when homeless people sleep in our parks, isolated and alone, it is all too easy to ignore them. What the homeless persons in this case seek is to assemble in modest numbers and send a message consciously and deliberately, in the hopes that more of us will notice and be moved to respond.

The question in this case, therefore, is not whether the government will allow the overnight presence of homeless people in Lafayette Park or on the Mall; it already does. Rather, the issue is

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29/ Declarations of Mary Ellen Hombs, ¶ 25, and Carol Fennelly, ¶ 7, RD 5; see also Second Declaration of Clarence West, ¶ 2, RD 5.

whether that presence can have a political dimension, an expressive dimension intended by the homeless people themselves.

SUMMARY OF ARGUMENT

Respondents' proposed activity, sleeping outdoors in a highly visible public place in the dead of winter without amenities to convey the plight of homeless people in America, is expressive conduct meriting presumptive protection under the First Amendment. It constitutes "speech" within the meaning of the First Amendment because respondents intend to convey a particularized message and because the likelihood is great that under the circumstances the message will be understood by those who view it. See Spence v. Washington, 418 U.S. 405, 410-11 (1974); Brown v. Louisiana, 383 U.S. 181 (1966). The form of respondents' expressive activity, its location, and the season in which it occurs, will ensure that the intended

message is understood.

Respondents' expressive activity is crucial to their exercise of First Amendment rights. In this respect, it is similar to the activity of many other Americans who have marched, engaged in sit-ins, and maitained silent vigils in efforts to seek redress of their grievances. Because homeless persons are among the most disadvantaged members of our society, many of them lack the resources and skills necessary to communicate their ideas through classic forms of verbal expression. Yet, like many other disadvantaged Americans, they are able to convey their ideas effectively with a form of symbolic speech. They seek, as one court of appeals judge noted, to express the poignancy of their plight with their bodies.

Expressive activity of this type merits First Amendment protection unless the government can show that it has a substantial or important interest in prohibiting it. In the instant case, petitioners have failed to demonstrate that they have any substantial interest in applying their new "no camping" regulation to ban the expressive activity at issue here. Indeed, as noted below, respondents dispute the applicability of the "no camping" regulation to their conduct here because they do not seek to use park areas for living accommodation purposes.

If, however, the Court determines that the regulation does apply to respondents' proposed activity, then it must also determine whether the regulation's facially valid ban on camping, as applied to the expressive

activity at issue here, is narrowly tailored to any important government interest.

Petitioners have erred in suggesting that the government's ban on the conduct at issue here is justified if it serves merely a reasonable purpose. Petitioners' Br. at 31-33. Such arguments for a lowered standard of judicial review, as applied to symbolic rather than "pure" speech, are devoid of doctrinal support. Moreover, such arguments, if adopted, are likely to create a category of "second class" First Amendment protection, guaranteeing lesser and fewer rights of expression to those citizens whose resources are more limited and whose expressive skills are less sophisticated.

Respondents submit that the Constitution and the decisions of this

Court require petitioners to demonstrate a substantial government interest as a basis for suppressing the symbolic speech at issue here. Petitioners' have not met and cannot meet this standard. There is no important government interest in prohibiting sleep in the context of a demonstration involving symbolic tents and a twenty-four hour presence by a limited number of demonstrators, particularly when the permits for such activity must be renewed weekly, subject to continuing compliance with a detailed and comprehensive set of controls on conduct in the parks.

Petitioners contend, however, that if demonstrators are allowed to engage in expressive sleeping activity, numerous non-demonstrating park visitors will seek to camp in the memorial core parks. This ad horrendum argument is flawed in

several respects.

First, it misinterprets the proper scope of the "substantial interest" test. That test requires the Court to weigh the government's interest in prohibiting expressive activity by all persons similarly situated to the group asserting First Amendment rights. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981). In this case, therefore, the relevant government interest to be weighed is the interest, if any, in preventing those persons and groups who seek to sleep outdoors without amenities as part of a demonstration from doing so.

Second, petitioners' ad horrendum argument is wholly speculative. Past demonstrations in the memorial core parks that included sleeping activity did not precipitate an onslaught of people

seeking to sleep in those locations without amenities.

Third, petitioners' ad horrendum argument assumes that the government will be unable to distinguish between those persons who may in good faith seek to engage in sleeping as part of a demonstration and those who may assert an expressive purpose merely as a pretext for sleeping in the park. This argument ignores other instances in which government agencies inquire into the sincerity of groups seeking to exercise First Amendment rights. Such inquiries do not involve content-based discrimination.

In sum, petitioners have not identified any interests substantial enough to justify the Park Service's ban on respondents' protected First Amendment activity.

Finally, as noted above, petitioners contend that the no-camping regulation does not, by its terms, bar their expressive conduct. The regulation prohibits a combination of activities which amounts to use of the parks for living accommodation purposes. 36 C.F.R. §§ 50.19(e)(8) and 50.27(a). Respondents seek only to sleep; they will not break ground, build fires, cook or prepare food, or store personal belongings. Hence, under the "totality of circumstances" test set forth in the Park Service regulation (id.), the homeless persons seeking to demonstrate here will not be camping. Respondents submit, therefore, that this Court could fairly construe the Park Service regulation as not prohibiting the activity at issue here, and thereby avoid unnecessary adjudication of a constitutional issue.

ARGUMENT

INTRODUCTORY STATEMENT

Critics of the First Amendment are fond of charging that free speech is the exclusive province of the socially and economically comfortable. Since, they argue, the most disadvantaged segments of any society cannot engage in classic verbal speech because of educational deprivation, poverty or physical or mental incapacity, the First Amendment is a false beacon which legitimates their exclusion from public discourse.

Two significant lines of Supreme Court doctrine stand as dramatic and persuasive refutations of such a critique. First, this Court has recognized that the mode of communication protected by the First Amendment is not narrowly confined to classic verbal expression. Indeed, the first case in

which this Court invalidated a state criminal conviction as violative of the First Amendment involved, not verbal expression, but the display of a red flag. Stromberg v. California, 283 U.S. 359 (1931). As the Solicitor General's brief accurately notes:

> This Court has recognized that the purpose of the First Amendment is to protect the people's right to communicate -- to express thoughts and ideas and emotions -- and that, consequently, non-verbal activity ("conduct") that is significantly communicative may deserve First Amendment protection as "symbolic speech."

Petitioners' Br. at 19.30/

30/ See, e.g., Stromberg v. California, 283 U.S. 359 (1931) (display of red flag protected); Gregory v. City of Chicago, 394 U.S. 111 (1969) (civil rights march protected); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (wearing of black armband protected); Brown v. Louisiana, 383 U.S. 131 (1966) (peaceful sit-in protected); Spence v. Washington, 418 U.S. 405 (1974) (per curiam) (peace symbol on flag protected); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (dancing protected).

Second, this Court has ruled that free public spaces, such as streets and parks, are proper and natural settings for First Amendment activity. United States v. Grace, 103 S. Ct. 1702 (1983).31/ Indeed, the first case in which this Court applied the First Amendment prospectively against local officials involved an attempt to bar economically disadvantaged persons from the use of streets and parks as First Amendment fora. Hague v. CIO, 307 U.S.

31/ See also Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) ("The right to use a public place for expressive activity may be restricted only for weighty reasons.").

496 (1939).32/ Thus, although difficult issues of First Amendment geography will undoubtedly arise,33/ the Solicitor General is correct in noting that:

> Just because [Lafayette Park and The Mall] have a special place in the national consciousness and because they have such resonance, they ... constitute a fitting and powerful forum for political expression and political protest.

Petitioners' Br. at 11.

32/ The classic formulation of the right to engage in expressive activity in our public places is Justice Robert's statement in Hague v. CIO:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

307 U.S. at 515.

33/ See, e.g., United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114 (1981) (postal boxes not open to First Amendment activity).

By combining the protection of non-verbal communicative activity with the protection of the right to engage in expressive activity in public places, this Court has made it possible for every segment of American society, including the most disadvantaged, to participate in the robust and wide-open debate that characterizes a free society.

In the years since World War II, this nation has witnessed an extra-ordinary outpouring of free expression. What makes that outpouring unique is neither its volume nor its content. Rather, it is the extent to which the poor, the poorly educated and the disadvantaged have been able to enter into the free marketplace of ideas and, by acting as full participants in the democratic process, have been able to influence the course of the nation. No

society has similarly reached out to its economically and politically dispossessed and provided them with the non-violent means of articulating their discontent and their aspiration for change. The relative peacefulness of social change in our society bears witness to the wisdom of this course. Cf. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-12 (1982).

While the crosscurrents of our recent history are complex and the causes and effects problematic, one fact emerges with stark clarity: The capacity of a disenfranchised people to rise above a century of oppression and to demand equality was immeasurably enhanced by the decisions of this Court which enabled persons of limited verbal sophisitication and even more limited financial resources to "speak" with their bodies in the public spaces of this nation.

Such a mass outpouring of expression is, of course, not without social cost. The widespread use of non-verbal communication in public places poses obvious challenges to a host of legitimate social interests, ranging from noise abatement and traffic control to the preservation and allocation of scarce geographical resources. The attempt to reconcile our commitment to free speech for all, even the disadvantaged, with such legitimate concerns of society has provided this Court with an unending variety of difficult cases.

Respondents believe that both parties herein, as well as the six members of the court below who constituted the majority and the judges who joined in Judge Wilkey's dissent, are in basic agreement as to the applicable legal principles. See Community for

Creative Non-Violence v. Watt, 703 F.2d 586, 592-95 (D.C.Cir. 1983) (Mikva, J.); 601-02 (Edwards, J., concurring); 605 (Ginsburg, J., concurring in the judgment); 611-13 (Wilkey, J., dissenting). Thus, petitioners recognize that symbolic conduct may qualify for presumptive protection under the First Amendment. Petitioners' Br. at 13, 19, 25 n.21. Petitioners also recognize that such conduct is appropriate in public places and that the memorial core park areas of the District of Columbia are particularly apt settings for such political expression. Id. at 11. For their part, respondents acknowledge that such symbolic conduct may be regulated if genuinely necessary to serve important government interests. What divides the parties are the much narrower questions of whether the act of sleeping in the

context of this demonstration is sufficiently expressive to warrant presumptive protection under the First Amendment, and, if so, whether sufficiently weighty governmental interests exist to justify rebutting the presumption.

I. RESPONDENTS' COMMUNICATIVE ACTIVITY IS CENTRAL TO A PORTRAYAL OF THE PLIGHT OF THE HOMELESS AND IS, THUS, IMBUED WITH SUFFICIENT EXPRESSIVE CONTENT TO QUALIFY FOR PRESUMPTIVE FIRST AMENDMENT PROTECTION

Petitioners recognize that non-verbal modes of expression such as the display of a symbol or the holding of a march or a candlelight vigil are valuable means of communicating thoughts and emotions and are, thus, entitled to a degree of First Amendment protection. Petitioners' Br. at 21-22. Notwithstanding such a welcome recognition, petitioners argue that respondents' attempt to portray the plight of the homeless by sleeping outdoors in a public place in the dead of winter to demonstrate the central facet of their homelessness is not sufficiently communicative to warrant any constitutional protection. Petitioners' Br. at 18. However, precisely because the act of

sleeping outdoors is so central to an accurate portrayal of the reality of homelessness and so critical to the existence of an effective demonstration, it is entitled to presumptive constitutional protection.

A. This Court Has Repeatedly Recognized the Protected Nature of Symbolic Expression

This Court has repeatedly recognized that non-verbal expressive activity is a potent form of communication which should receive First Amendment protection. Of course, recognizing that non-verbal expressive activity qualifies for presumptive protection does not mean that the presumption may never be rebutted; it does, however, mean that such expressive activity should not be suppressed unless there is a compelling need to do so and that the burden of establishing that need rests upon the government agency which seeks to ban it.

Thus, in Stromberg v. California, 283 U.S. 359 (1931), the Court invalidated a criminal conviction for displaying a red flag in violation of a California statute. Recognizing that the display of a symbol was clearly "speech" within the meaning of the First Amendment, the Stromberg Court ruled that California had not demonstrated a sufficiently compelling justification for the prohibition to rebut the strong presumption in favor of free expression.

Similarly, in Brown v. Louisiana, 383 U.S. 131 (1966), the Court invalidated criminal trespass convictions of Black demonstrators for engaging in a silent vigil in a racially segregated public library. Recognizing that the silent protest vigil was a potent shortcut from mind to mind, the Brown Court ruled that despite the facial validity of the criminal trespass

statute, Louisiana had not demonstrated a sufficiently compelling justification for applying it to suppress the expressive activity in question.34/

In Edwards v. South Carolina, 372 U.S. 229 (1963), the Court described a civil rights march to the South Carolina State House as "an exercise of ... basic constitutional rights in their most pristine and classic form." Id. at 235. Similarly, in Gregory v. City of Chicago, 394 U.S. 111 (1969), the Court reversed disorderly conduct convictions for engaging in a civil rights march, noting:

34/ As in Brown v. Louisiana, 383 U.S. 131, respondents here do not challenge the facial validity of the ban on camping. Rather, as in Brown, it is the attempt to apply it to respondents' communicative activity which raises the constitutional question. See discussion of this point infra on pages 57-63.

> Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment.

Id. at 112. In both Edwards and Gregory, the Court first recognized that the communicative conduct before it qualified for presumptive constitutional protection and then required the government to carry the burden of demonstrating a compelling need before applying even a facially valid statute to suppress it.35/ See Thornhill v. Alabama, 310 U.S. 88 (1940).

In Tinker v. Des Moines School District, 393 U.S. 503 (1969), the Court set aside a student's suspension from public school for wearing a black armband

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35/ Where a genuine need for the restriction has been demonstrated, the Court has sustained the facial validity of the statutes in question. Cameron v. Johnson, 390 U.S. 611 (1968) (protecting ingress and egress); Cox v. Louisiana, 379 U.S. 536 (1965) (free passage and prevention of serious public disorder).

to protest the Vietnam War. Recognizing that wearing a black armband was "closely akin to 'pure speech'" (id. at 505), the Tinker Court required the school board to demonstrate a genuine need for the prohibition in order to rebut its presumptively protected status. Since the school board could produce nothing more than the "undifferentiated apprehension" of future harm (id. at 508), the Court overturned the ban on expressive activity.

In Spence v. Washington, 418 U.S. 405 (1974), the Court reversed a conviction for placing a peace symbol on an American flag in violation of the state's flag display statute. The Court held that:

> the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression,

id. at 409-10, and required the state to demonstrate a genuine need before suppressing the expressive activity. Since the state was unable to justify the prohibition, the Court deemed the flag display statute "unconstitutional as applied to appellant's activity" (id. at 414), and concluded:

> Given the protected character of [the] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately-owned flag was significantly impaired on these facts, the conviction must be invalidated.

Id. at 415.

Recently, in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), and Schad v. Borough of Mt. Emphraim, 452 U.S. 61 (1981), the Court recognized that entertainment consisting primarily of dancing in various stages of undress qualified for a

degree of First Amendment protection.

In those instances when the Court has upheld bans on expressive activity, it has utilized the same two-part analysis. In United States v. O'Brien, 391 U.S. 367 (1968), the Court found that the government's interest in maintaining an efficient Selective Service registration system justified a prohibition on draft card burning, despite the obvious communicative nature of the act. The government's assertion of need for a ban on the destruction or mutilation of a draft card -- as credited by the Court -- provided precisely the fact-based justification which was lacking in Stromberg, Brown, Edwards, Gregory, Tinker, and Spence. And in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), the state's demonstrated need to regulate

traffic flow on a crowded fairground justified its limitation on peripatetic solicitation.

The teaching of these cases is clear. Once non-verbal activity is deemed to play a significant role in the communication of ideas, it qualifies for presumptive First Amendment protection, which can be rebutted only by a showing that its suppression is genuinely necessary to achieve a significant and legitimate social goal. If the government fails to make such a showing, it may not apply even a facially valid statute in an unconstitutional manner.

B. Respondents' Attempt to Portray the Plight of the Homeless by Sleeping Outdoors in the Dead of Winter in a Highly Public Place Is a Form of Symbolic Expression

In Spence v. Washington, 418 U.S. 405 (1974), this Court articulated common sense criteria for deciding when

non-verbal activity is sufficiently imbued with expressive elements to qualify for presumptive First Amendment protection. In order to qualify for such protection, non-verbal activity must (1) involve "an intent to convey a particularized message;" and (2) present a likelihood that in the surrounding circumstances "the message could be understood by those who viewed it." 418 U.S. at 410-11. Both criteria are satisfied by respondents' attempt to sleep in a highly public place under conditions which typify those which thousands of individual homeless men and women endure each night in less visible locations. As Judge Edwards noted below:

> A nocturnal presence at Lafayette Park or on the Mall, while the rest of us are comfortably couched at home, is part of the message to be conveyed. These destitute men and women can

> express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match.

Community for Creative Non-Violence v. Watt, 703 F.2d at 601.

Respondents seek to re-enact in a highly public place a vignette that unfolds in solitude, loneliness, and despair for two to three million Americans every winter's night -- sleeping outdoors without decent shelter. Homeless people are, for most of us, invisible. How else can we explain the fact that over the recent Christmas holidays, fourteen homeless people in New York City and three in Washington, D.C. could be allowed to freeze to death on the street?36/ Even when we are confronted

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36/ See N.Y. Times, Dec. 27, 1983, at A-1, col. 1; Wash. Post, Dec. 27, 1983, at A-1.

with verbal descriptions of their plight, so powerful is the understandable human tendency to ignore the unpleasant, that large numbers of Americans view the homeless as an abstraction, without fully sensing the underlying human tragedy.

Respondents seek to jolt a complacent and comfortable public into a realization of what it means to be a homeless person by demonstrating at the center of the nation's consciousness the fact that human beings are sleeping without decent shelter during the coldest months of the year. Obviously, the act of sleeping under such conditions is the dramatic event that both portrays the larger reality and engages the attention and sympathetic concern of the public. If nude dancing is sufficiently expressive to warrant a degree of First

Amendment protection,[37] surely the attempt by the homeless to use one of the few modes of communication available to them -- their bodies -- to draw attention to the fact that they have no place to sleep in the dead of winter is entitled to commensurate protection.[38]

Petitioners, recognizing that respondents seek to utilize the act of sleep in the context of this demonstration as a form of expression, raise unpersuasive objections to according it presumptive First Amendment protection. Petitioners argue that sleep, unlike armbands or flags, is not inherently expressive and, thus, cannot constitute a

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37/ See Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

38/ As the Court recognized in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632 (1943), "Symbolism is a primitive but effective way of communicating ideas."

form of expression. Petitioners' Br. at 21. However, petitioners' attempt to distinguish between non-verbal activity that they characterize as "inherently expressive" (id. at 21-22) and all other forms of non-verbal communication is unavailing. It overlooks the fact that all non-verbal communication takes its expressive meaning, not from the intrinsic nature of the act, but from the context in which it unfolds. As the Court noted in Spence:

> ... the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol.

418 U.S. at 410 (emphasis added).

For example, wearing a black armband to class, the symbolic act held protected in Tinker, had no intrinsic meaning. It was only in the context of a day of protest against the Vietnam War that the

armband in Tinker took on a precise meaning which triggered First Amendment protection. 393 U.S. at 504. Similarly, the act of holding a candle or spending a day without eating has no intrinsic significance but may be readily recognized as expressive when conducted in a context that identifies it as a candlelight vigil or a hunger strike. And, in this case, the context surrounding the act of sleeping outdoors makes the plea by the homeless powerful and unmistakable.

Indeed, measured by the thoughtful test suggested by petitioners, respondents' request for permission to re-enact in a highly public place the plight of homeless persons by sleeping outdoors in the dead of winter qualifies for presumptive First Amendment protection. Petitioners recognize that First

Amendment protection should exist for expressive conduct "that can contribute meaningfully to the expressive communication of ideas, opinions and emotions." Petitioners' Br. at 25. Petitioner also recognizes that there may be

> some contexts in which an activity can convey a message with sufficient expressive power to be readily understood. A regulation designed to suppress that expression would be subject to First Amendment scrutiny even if, on its face, it affected only common activity not ordinarily classified as speech; First Amendment values are always implicated when the government seeks to suppress or regulate communication.

Petitioners' Br. at 25 n.21.

Respondents have no quarrel with such a formulation. Respondents' disagreement is solely with petitioners' insistence that sleeping outdoors in the context of respondents' planned demonstration is not a powerfully expressive act worthy of First Amendment protection.

Petitioners' ambivalence about whether to recognize the expressive nature of respondents' proposed act flows, respondents suggest, less from a serious doubt as to its communicative value, than from a concern over the variety of activity which might qualify for First Amendment protection. Petitioners fear that the descriptive test enunciated in Spence is "overinclusive" and will permit persons engaged in violent activity to claim that their lawless acts were intended to communicate a message. Petitioners' Br. at 24 n.18.

However, as the Court in O'Brien clearly recognized, limitations exist on any attempt to claim constitutional protection for non-verbal expressive activity. To qualify as symbolic speech, expressive activity must stand some

chance of surviving the balancing test which is the second half of the First Amendment equation. Political assassination and terror bombings may, in the twisted minds of the fanatics who perpetrate them, be intended as forms of expression. But no one would suggest for a moment that such activity qualifies for any protection. The balance which the First Amendment requires dooms such anti-social activity from the beginning, regardless of any alleged expressive content. In fact, courts have had little difficulty rejecting claims of protection for far less dramatic activity. E.g., United States v. Guerrero, 667 F.2d 862 (10th Cir. 1981) (throwing eggs at political candidate); United States v. Malinowski, 472 F.2d 850 (3rd Cir. 1973) (refusal to pay taxes), cert. denied, 411 U.S. 970 (1973); United States v.

Berrigan, 283 F. Supp. 336 (D. Md. 1968) (destruction of Selective Service files), aff'd sub nom. United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970). Thus, petitioners' fear that application of the Spence and O'Brien tests will tend to over-protect anti-social activity is unfounded.

In sum, petitioners' argument that respondents' activity is not communicative must be rejected. Both legal principles and factual considerations support the conclusion that the proposed act of sleeping outdoors in a highly public setting in an attempt to dramatize the plight of the homeless is sufficiently expressive to warrant presumptive First Amendment protection. Therefore,

the only remaining issue is whether petitioners have marshalled a sufficiently compelling justification for suppressing the expressive activity under the rubric of a ban on camping.

II. SUPPRESSION OF RESPONDENTS' COMMUNICATIVE ACTIVITY IS NOT NECESSARY TO PROTECT AN IMPORTANT GOVERNMENTAL INTEREST

Respondents do not challenge the facial validity of petitioners' regulation banning camping in the memorial core parks. However, as applied to respondents' symbolic attempt to re-enact the central facet of homelessness by sleeping outdoors in a highly public place in the dead of winter, the ban on camping stifles expressive activity unnecessarily. As with the facially valid criminal trespass statute in Brown v. Louisiana, 383 U.S. 131 (1966), the facially valid disorderly conduct statutes in Edwards v. South Carolina, 372 U.S. 229 (1963), and Gregory v. City of Chicago, 394 U.S. 111 (1969), and the facially valid flag display statute in Spence v. Washington, 418 U.S. 405 (1974), the facially valid

ban on camping at issue in this case may not be applied to stifle expressive activity in the absence of a genuine showing of social need.

Petitioners apparently argue that so long as the general ban on camping is facially valid it may be applied in all settings without raising First Amendment issues. Petitioners' Br. at 31-50. However, such an analysis stands the traditional relationship between "facial" and "as applied" review on its head.

Traditionally, this Court has insisted on determining whether the behavior of the particular litigant before the Court deserves constitutional protection. United States v. Raines, 362 U.S. 17 (1960). Thus, this Court has routinely declined to permit the application of facially valid statutes and regulations to constitutionally protected activity. See, e.g., Brown v.

Louisiana, 383 U.S. 131 (1966); Edwards v. South Carolina, 372 U.S. 229 (1963); Gregory v. City of Chicago, 394 U.S. 111 (1969); and Spence v. Washington, 418 U.S. 405 (1974). Occasionally, this Court has even permitted litigants to raise the rights of third persons in an effort to demonstrate that the statute in question was facially invalid even though the activities of the litigants before the Court might not have been constitutionally protected. See generally Broadrick v. Oklahoma, 413 U.S. 601, 611-16 (1973). Such a relaxation of the traditional rules of standing is, as the Court has noted, "strong medicine" to be used sparingly. Id. at 613.

Not surprisingly, therefore, this Court has never suggested that a litigant's First Amendment rights may be tested not by the litigant's own behavior, but by what third persons might

do in the future. Such an analysis would focus the Court's attention, not on the case or controversy before it, but on hypothetical cases which may never arise. While such an overbreadth analysis may be appropriate to protect vigorous First Amendment activity from improper regulation, it can never be used to suppress activity which, on its own terms, is independently protected by the First Amendment.

Thus, after Broadrick, while a facial challenge to Oklahoma's "little Hatch Act" would be barred, this Court anticipated that "as applied" challenges would continue. 413 U.S. at 614-16 (1973). See also Buckley v. Valeo, 424 U.S. 1, 72-74 (1976); Brown v. Socialist Workers 1974 Campaign Committee (Ohio), 103 S. Ct. 416, 419 (1982); Federal Election Commission v. Hall-Tyner Election Campaign Committee, 678 F.2d 416

(2nd Cir. 1982), cert. denied, 103 S. Ct. 785 (1982). Similarly, while the facial validity of the ban on camping is not at issue here, the Court must assess its validity as applied to respondents' expressive activity.

Petitioners do not even attempt to demonstrate that respondents' proposed activity would itself pose a serious threat to the preservation of the parkland or to the imperative of shared and multiple enjoyment of the parks. Indeed, respondents freely acknowledge an obligation to leave the parkland in at least as well maintained a state as they find it and a willingness to accommodate other persons wishing to use the parkland. Jt.App. at 9-15. Rather, petitioners seek to justify application of the no camping regulation to respondents by launching a classic ad horrendum argument. Petitioners argue

that if respondents are allowed to sleep as part of their demonstration, it will be impossible to prevent widespread use of the core area parks as campgrounds by other persons claiming to be engaged in expressive activity.

Where expressive activity protected by the First Amendment is at stake, however, the mere assertion of an undifferentiated fear of future abuse can never justify suppression. Tinker v. Des Moines School District, 393 U.S. 503 (1969). Moreover, ample safeguards exist that would allow petitioners to preserve the integrity of a general ban on camping, while permitting narrow exceptions for expressive activity undertaken in good faith.

Since it is unnecessary to stifle respondents' expressive activity in order to enforce a general ban on camping, and

since respondents' activity itself poses no threat to any legitimate governmental interest, petitioners' attempt to apply the no camping regulation to ban respondents' expressive activity violates the First Amendment.

A. The Standard of Review in First Amendment Cases Is Designed to Minimize the Improper or Unnecessary Suppression of Expressive Activity

The basic purpose of the First Amendment is to shield expressive activity from improperly motivated or unnecessary suppression by the government. Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969). Not surprisingly, therefore, this Court has adopted a standard of review in First Amendment cases which requires the government to do more than establish mere rationality in

order to rebut the presumption in favor of free speech.

In cases involving classic modes of verbal expression, such as speech-making and publishing, the method of expression almost never impinges upon a legitimate governmental interest. In such cases, attempts at suppression are almost always framed in terms of preventing certain adverse consequences which are alleged to flow from the content of the speech in question. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969). Prior to the Holmes-Brandeis formulation of the modern role of the First Amendment,39/ this

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39/ See generally, Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

Court utilized a variation of "rational basis" review to uphold restrictions on certain speech based on its "bad tendency" to lead to anti-social behavior. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925). Under the "bad tendency" test, a speech ban was valid as long as the government had a rational basis for believing that the speech might lead to something worse. Id. at 667. The "clear and present danger" test formulated by Justices Holmes and Brandeis was, of course, nothing less than the rejection of the "bad tendency-rational relationship" standard in favor of a more stringent standard of review, which required a showing, not merely of rationality, but of compelling necessity, before speech could be silenced.

Similarly, as Americans experimented with more novel forms of expression such

as leafletting and picketing, this Court rejected a rational basis standard of review as insufficiently protective of robust communication in favor of a standard which required a showing that the restriction was, in fact, necessary to achieve an important governmental end. Thus, a rational relationship between leafletting and the prevention of litter, while clearly a legitimate concern, was too weak a basis on which to suppress speech. See, e.g., Schneider v. State, 308 U.S. 147 (1939); Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (Frankfurter, J., concurring). See also Lovell v. Griffin, 303 U.S. 444 (1938).

Similarly, although there is a rational relationship between picketing and impeding free public passage, that interest was deemed insufficient to warrant a general ban on picketing. See,

e.g., Thornhill v. Alabama, 310 U.S. 88 (1940); Cox v. Louisiana, 379 U.S. 536 (1965).

Modern First Amendment cases have continued to recognize that heightened scrutiny is necessary to ensure adequate protection of First Amendment values. Thus, in two of its most recent First Amendment decisions the Court made careful use of the strict standard of review, which requires the government to demonstrate a compelling need -- not merely some lesser basis -- for suppressing expressive activity. In United States v. Grace, 103 S. Ct. 1702 (1983), this Court invalidated a ban on First Amendment activity on the sidewalk abutting the Supreme Court. As the Court recognized, it was a proper purpose for Congress to desire that the sidewalk immediately abutting the Court reflect the tranquility which is the hallmark of

reasoned adjudication. The Court noted that purpose was rationally served by a ban on all demonstration activity on the sidewalk. Id. at 1709. However, despite the rationality of the Congressional purpose, the Court in Grace found that the government had not demonstrated a compelling need to ban the expressive activity at issue.

Similarly, in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), this Court considered whether a requirement that solicitation of funds at the Minnesota State Fair take place at fixed booths was necessary to advance a sufficiently important state interest. The Court recognized that crowd control was a significant concern, but that recognition did not end its inquiry. It was only because the state had

demonstrated the actual necessity for its fixed booth requirement in the densely populated fairgrounds that this Court upheld the regulation as necessary to advance it. Id. at 651-55. Thus, unlike the activity at issue in Grace and the activity at issue in this case, the solicitation in Heffron actually created a threat to an important governmental interest.

The application of such a standard in First Amendment cases is far more than a legal technicality. As with the related concept of burden of proof, the standard of review determines the ease with which the government may overcome the presumption of freedom to engage in expressive activity established by the First Amendment. See generally Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. 418 (1979); In re

Winship, 397 U.S. 358 (1970). A standard of review premised on mere rationality would permit the presumption to be overcome in virtually every case -- witness the unhappy history of the First Amendment under the "bad tendency" test and the fate of most challenges to government regulation of economic activity. See, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). See also Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Pilots Comm'rs, 330 U.S. 552 (1947).

On the other hand, the heightened standard adopted by the Court requires that the government marshal very significant justifications for any attempt to suppress expression. The application of the heightened standard,

therefore, provides the breathing space which permits robust expression to flourish. It assures that, despite the stress of a complex world, we continue to be faithful to the preeminent role free expression plays in our system.

Petitioners' brief accurately notes the heightened judicial protection generally afforded expression. Petitioners' Br. at 27, 31. Petitioners argue, however, that where non-verbal expressive activity is at stake, a lesser degree of protection is appropriate. Thus, petitioners suggest a sliding scale of protection, ranging from heightened protection for classic verbal speech and "inherently communicative" symbols like flags and armbands to a lesser standard for expressive activity similar to respondents'. Petitioners' Br. at 25-27, 29-34. However, such a sliding scale would doom unorthodox forms of expression

to widespread suppression and would dramatically reduce the ability of the disenfranchised to join in the national debate.40/ No basis exists to suggest that verbal expression should enjoy a high degree of protection but that

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40/ Given the importance of First Amendment activity, as recognized in the Constitution and by the Court, it is unfortunate that petitioners have chosen to argue that a lower standard of review should apply here. See Petitioners' Br. at 25-27, 29-34. Petitioners took the position in the district court and the court of appeals that they should demonstrate, and could demonstrate, that their decision to prohibit expressive sleeping activity was necessary to serve substantial government interests. See Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 9-12, RD 12; Appellees' Response in Opposition to Appellants' Emergency Motion for Injunction Pending Appeal at 18-19, 28-30. Doubts about whether petitioners made or failed to make the requisite showing in the instant case should not prompt them to urge, or the Court to adopt, modifications in the key constitutional standard.

symbolic expression, often the only means of expression available to the most seriously disadvantaged, should be subject to widespread suppression under a lesser test. Indeed, the adoption of differential standards of review keyed to the form of expression would itself raise serious constitutional questions. Cf. Minneapolis Star and Tribune Co. v. Minnesota Comm'r. of Revenue, 103 S. Ct. 1365 (1983).

Rather, this Court should continue to afford heightened protection to all expression, recognizing that while the form of expression ought not to affect the standard of review, it obviously affects the degree of justification available to the government in seeking to defend the prohibition at issue. The question raised by this case, therefore,

is whether the government has demonstrated that the suppression of the expressive activity at issue here is necessary to advance a significant governmental interest. If the government has not made such a showing, no reason exists to tolerate the snuffing out of an expressive voice -- even an unorthodox one.

B. Permitting Respondents' Demonstration Activity Will Not Compromise Petitioners' Ability to Enforce an Effective Ban on Camping in the Memorial Core Parks

Petitioners rest much of their case on the argument that if respondents are permitted to sleep as part of their demonstration, the general public will become entitled to camp overnight in Lafayette Park and on the Mall, thereby destroying the ban on camping in the parks. This ad horrendum argument suffers from three basic flaws.

First, petitioners misinterpret the proper scope of the inquiry into the relevant government interest. Two polar approaches exist to the problem. Both are wrong. In Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), a religious group unsuccessfully argued that in weighing the relevant governmental interest advanced by a regulation on First Amendment activity, only the activities of the particular speakers before the court could be considered. This Court rejected such an attempt to narrow the scope of inquiry, holding that the government interest must be weighed in light of "similarly situated" groups likely to engage in the same First Amendment activity. Id. at 652-53.

In the instant case, petitioners assert the polar opposite of the position taken by the religious group in Heffron.

They argue that in weighing the governmental interest in suppressing expressive activity the Court must make the assumption that every member of the general public would engage in the same activity. Petitioners' Br. at 45, 47.

However, the government's attempt to unduly broaden the scope of inquiry in this way is no more acceptable than was the religious group's attempt to unduly narrow it in Heffron. Both polar aproaches ignore the Court's common sense recognition that the appropriate scope of inquiry is the group of similarly situated persons likely to engage in the First Amendment activity at issue. Heffron, 452 U.S. at 652-53. In the context of this case, few, if any, members of the general public are "similarly situated" to respondents

within the meaning of Heffron.41/

The second flaw in the government's ad horrendum argument is that it is based on the wholly speculative, entirely unsubstantiated assumption that many persons will seek permission to sleep overnight in Lafayette Park or on the Mall. As noted above, this is the type of undifferentiated fear or apprehension that this Court has rejected when proffered as the basis for a limitation on expressive conduct. See Tinker v. Des Moines School District, 393 U.S. 503, 508 (1969). There is no historical or empirical basis for this fear. Indeed,

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41/ Petitioners' suggestion that a search for similarly situated persons is "artificial" or "circular" (Petitioners' Br. at 46 n.39), appears to assume that no criteria exist to differentiate respondents from the general public. The obvious distinction between persons seeking in good faith to express an idea by sleeping outdoors without amenities and some putative campers is discussed infra at pages 79-82.

there have been a limited number of occasions when the government has permitted or countenanced sleeping activity in Lafayette Park or on the Mall. Most recently, the Park Service permitted approximately 750 to 1,000 Vietnam veterans to sleep on the Mall for three days in May 1982 in a reenactment of conditions they endured during the Vietnam conflict, and renewed the demonstration permit for approximately twelve Arab women (including the wives of several diplomats) who were sleeping in Lafayette Park as part of a ten-day vigil and hunger fast in the summer of 1982.42/ Neither of these two demonstrations, nor other earlier occasions (in the 1930s and 1960s) involving sleeping in the core

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42/ See Statement of the Case, supra at pages 17-18, and portions of the record cited therein.

memorial park areas, resulted in an onslaught of requests to sleep or stay overnight in these parks.43/

The third flaw in petitioners' ad horrendum argument is that it assumes the impossibility of distinguishing between respondents' obviously good faith attempt to dramatize a tragic reality and a bad faith attempt to use the parks as a campground by persons pretending to

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43/ Even assuming arguendo that more persons will seek to engage in expressive sleeping activity in demonstration contexts if respondents' activity is allowed, the government has not shown that this will tax its resources or in any way deprive other users of park space. A wide variety of regulatory restrictions, already contained in 36 C.F.R. Part 50 (and described in footnote 24, supra), will serve to ensure that this expressive sleeping does not expand to include activities that might tax park resources. Moreover, in the highly unlikely event that there is a "great increase" (Petitioners' Br. at 39) in the number of demonstrators who seek to engage in such activity, there are a wide variety of options available to the Park Service for avoiding, or meeting and resolving, any problems which may arise. See Community for Creative Non-Violence v. Watt, 703 F.2d at 598-99, and nn.33-35.

demonstrate. Petitioners' Br. at 36-38. Such an assumption ignores the fact that several government agencies already make valid inquiries into the sincerity of individuals' or groups' claims for the exercise of First Amendment rights.

One example of such an inquiry is the system of conscientious objection to the military draft, which turns in large part on findings of sincerity and good faith. Under this system, the Selective Service Commission must determine whether a draft registrant's opposition to war on religious grounds is sufficiently sincere to warrant exemption from military service. See 50 U.S.C. App. § 456(j). Such a determination often requires more than a simple inquiry into whether the registrant belongs to an organized church or believes in a God or Supreme Being. See United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S.

333 (1970). It may require the agency to probe the sincerity of the registrant's asserted moral or ethical abhorrence of war. Welsh, 398 U.S. at 343-44.

Similarly, in determining whether the imposition of certain government obligations (such as compulsory school attendance) or the withdrawal of certain government benefits (such as unemployment compensation) interfere with the free exercise of religion, the appropriate government agency must first assess the sincerity of the religious belief asserted by the individual involved. See Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Sherbert v. Verner, 374 U.S. 398, 399 n.2 (1963).44/

44/ Under the Noerr-Pennington doctrine, those charged with the enforcement of federal anti-trust laws have a similar responsibility for weighing the bona fides of business entities' assertions that certain of their activities should be protected by the First Amendment, and for ascertaining that those assertions are not a mere sham to cover attempts to interfere with the

(footnote continued)

In sum, inquiries into bona fides are not uncommon in the administration of programs which implicate First Amendment rights. In the context of this case, such an inquiry would not require the Park Service to distinguish between speakers on the basis of the content of their messages, as petitioners suggest. Petitioners' Br. at 36-37. Rather, it would merely require the Park Service to assess whether a request by demonstrators to sleep in order to convey a message is made in good faith.45/

44/ (continued)
business relationships of a competitor. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

45/ Such an assessment of sincerity would, of course, require the Park Service to inform itself as to the content of the message to be conveyed and the demonstrator's asserted reasons for seeking to convey that message by sleeping. These types of assessments, which both courts and government agencies are called upon to make fairly and objectively, do not constitute content-based discrimination.

C. Permitting Respondents' Communicative Activity Will Not Impair Any Governmental Interests

Petitioners have agreed that respondents may conduct a demonstration on the Mall and in Lafayette Park consisting of (1) the erection of tents; (2) a round-the-clock presence of persons in and about the tents; and (3) the assumption of feigned postures of sleep by such persons. Respondents have agreed that the demonstrators may not (1) prepare or serve food; (2) build fires; (3) break the earth; or (4) store personal belongings. The sole point of disagreement between the parties is whether the demonstrators, while feigning sleep, may actually fall asleep. Petitioners have never suggested any reason -- rational or otherwise -- why such a distinction should be maintained. Once petitioners recognized that no basis

existed for banning respondents' round-the-clock demonstration involving feigned sleep, no rational basis existed for refusing to permit actual sleep during the demonstration.46/

46/ Petitioners have asserted two rationales for prohibiting sleep in a demonstration context. First, they attempt to argue that permitting sleep during an ongoing demonstration would deprive other users of park space, or tax park resources, sanitation facilities, or law enforcement personnel. Petitioners' Br. at 35-36. However, once the government has issued a permit for a certain number of demonstrators to use a designated quadrant of Lafayette Park, as provided under the current regulations for up to one week (36 C.F.R. § 50.19(e)(5)), or a designated subportion of the Mall, the amount of space occupied by those demonstrators, and the impact on park resources, does not depend on whether or not they sleep. During the one-week period covered by their demonstration permit, other park users can occupy and enjoy the other three quadrants of Lafayette Park and the entire remaining Mall area. At the close of the one-week period, if there are competing demands for the same space in use by the demonstrators, then their permit will not be renewed. Id.

Second, petitioners claim that the prohibition on sleeping in a demonstration context is justified because it will serve to limit the number of persons who seek to maintain a twenty-four hour vigil. Petitioners' Br. at 39, 43 n.36.

(footnote continued)

Petitioners claim that this argument is "perverse" because the Park Service only permits round-the-clock demonstrations and the erection of symbolic structures under the compulsion of earlier court of appeals decisions. Petitioners' Br. at 44. Petitioners' complaint is groundless. What petitioners overlook is the fact that the case on which they chiefly rely was a First Amendment - Equal Protection case:

46/ (continued)
However, the government is guessing when it asserts that allowing expressive sleeping activity will "greatly increase" (id. at 39) the number of demonstrators who maintain around-the-clock vigils. The government itself acknowledges that "not many people are up to the austerities of all-night vigils." Id. at 43 n.36. Yet it assumes, inexplicably, that many people will be "up to," indeed, will be eager for, the austerities of a vigil combined with expressive sleeping activity in an open, public space, with no food service, heating or cooling system, showers or other amenities. There is no evidence in the record or elsewhere to suggest that this is the case. Cf. Tinker v. Des Moines School District, 393 U.S. 503 (1969).

It only ordered the Park Service to extend to all demonstrators the privileges that had theretofore been extended to entities and groups with favored messages, such as the Christmas Pageant for Peace. See Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972). If the Park Service wishes to amend its regulations to restrict the use of symbolic structures, Women Strike for Peace does not prohibit it from doing so, as long as it extends those restrictions equally to everyone's activities.47/ But as long as favored entities and groups are permitted to use structures, it is the Constitution, not the court of appeals, that requires such "permission

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47/ Such restrictions, if proposed, would have to meet First Amendment criteria. The serious constitutional issues that might be posed by such an amendment to the regulations are not before the Court at this time.

[to] be granted with an even hand." Women Strike for Peace, 472 F.2d at 1304 (Robb, J., concurring).48/

Petitioners also argue that the majority below unfairly "disaggregated" the government's prohibition into its constituent parts in order to determine

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48/ Petitioners' other citations on this point are simply misleading. United States v. Abney, 534 F.2d 984 (D.C.Cir. 1976), struck down a regulation because of the unfettered discretion it placed in the hands of administrative officials. And Park Service regulations already permitted 24-hour demonstrations prior to A Quaker Action Group v. Morton, 516 F.2d 717 (D.C.Cir. 1975). See id. at 734.

Petitioners also advert to this Court's action in Morton v. A Quaker Action Group, 402 U.S. 926 (1971). Petitioners' Br. at 19 n.14. This Court's order in Morton summarily vacated, without explanation, an equally summary action by the court of appeals. The entire proceedings in this Court, from the initial filing of the Solicitor General's application for a stay to the issuance of this Court's order, spanned less than 24 hours. The unexplicated summary vacation of a summary modification of a preliminary injunction is not a decision on the merits and does not carry precedential weight in this Court. See Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981).

whether a particular prohibition was valid. Petitioners' Br. at 42. Such a "distorted analysis," petitioners charge, enabled the court "to invalidate the regulation by a technique of 'divide and conquer.'" Id. However, what the petitioners call "disaggregation" is merely a requirement that the government justify a ban on expressive activity by demonstrating that the proposed speech would, in fact, interfere with an important governmental interest.

In effect, petitioners argue that the sum of the government's ban is greater than is constituent parts and that it is unfair to require a justification for each element in the regulation. However, as even the dissenting judges below recognized, when the enforcement of a particular element is the pretext for banning expressive activity, the government's duty is not to

attempt to submerge the element in a mystical whole that resists analysis, but to explain why the particular element is genuinely necessary to advance an important government interest. See Community for Creative Non-Violence v. Watt, 703 F.2d at 615 n.43 (Wilkey, J., dissenting).

In short, petitioners have asserted a right to ban expressive conduct because they cannot be bothered with implementing a narrower prohibition which could permit expression while forbidding abusive activity. If the government can ban speech merely because of a risk that people may act abusively in the future and then justify the ban by claiming that it is too much trouble to take reasonable steps to minimize that risk, the First Amendment will have suffered a serious blow. See Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

III. RESPONDENTS' PROPOSED ACTIVITY IS NOT CAMPING WITHIN THE MEANING OF 36 C.F.R. PART 50

The parties and courts below have focused on the constitutionality of applying the Park Service's ban on camping to respondents' symbolic activity. However, as respondents pointed out in the court of appeals, it is possible to resolve this case without confronting the First Amendment issue.49/

As petitioners' brief carefully and correctly points out, the ban on camping is designed to prevent the use of parkland as "living quarters." Petitioners' Br. at 38. It is not intended to ban sleeping per se, but only sleeping as incidental to the use of the park as a living accommodation. That is, apparently, why the no camping regulation

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49/ See Appellants' Reply to Appellees' Opposition to Emergency Motion for Injunction Pending Appeal and Opposition to Appellees' Motion for Summary Affirmance at 71-73.

was not invoked against Vietnam veterans who erected a symbolic firebase on the Mall.50/ It is difficult to see how respondents' attempt to sleep outdoors in the dead of winter without food or personal belongings in an attempt to dramatize the plight of the homeless can be characterized as establishing a living accommodation. Community for Creative Non-Violence v. Watt, 670 F.2d 1213, 1216-17 (D.C. Cir. 1982).

50/ Community for Creative Non-Violence v. Watt, 703 F.2d at 589. Respondents continue to assert, as they did below (with considerable factual support), that the petitioners have unequally applied their new "no camping" regulation to allow sleeping activity by some demonstrating groups while prohibiting it by others. This equal protection claim, upon which the facts were sharply disputed, remains open. The district court improperly granted summary judgment on it, based on findings on disputed factual issues. The court of appeals found it unnecessary to reach the equal protection question. Therefore, if the case is not decided in respondents' favor on First Amendment grounds, or by an interpretation of the regulation in their favor, it should be remanded for further proceedings on their equal protection claim.

Indeed, the distinctions between a catnap at noon, a symbolic attempt to sleep in the park in an attempt to make a dramatic point, and an attempt to set up housekeeping in the park are implicit in the regulation itself. Where, as here, demonstrators do not seek to store personal belongings, to eat or to make fires, but merely seek to dramatize the plight of the homeless by publicly re-enacting their central dilemma, the activity cannot fairly be characterized as establishing a living accommodation. Thus, it does not fall within the no camping ban. Given the serious constitutional issues posed by a contrary interpretation of the regulation, it would be consistent with long-established doctrine to construe the no-camping regulation as permitting the respondents' symbolic activity. See United States v.

Clark, 445 U.S. 23, 26 (1980); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); Rosenberg v. Fleuti, 374 U.S. 449, 451 (1963).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed, or in the alternative, the case remanded for further proceedings on respondents' claim that the ban on

sleeping has been unequally enforced.

Respectfully submitted,

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